SUPREME COURT, U. S.

FEB 24 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1046

MALCOLM J. BARRETT, et al., *Petitioners,*

v.

BERTRAM ZWEIBON, et al., *Respondents.*

No. 75-1056

BERTRAM ZWEIBON, et al., *Petitioners,*

v.

JOHN N. MITCHELL, et al., *Respondents.*

No. 75-1059

JOHN N. MITCHELL, *Petitioner,*

v.

BERTRAM ZWEIBON, et al., *Respondents.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR RESPONDENTS IN NOS. 75-1046 AND 75-1059 AND REPLY MEMORANDUM FOR PETITIONERS IN NO. 75-1056

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BLEED THROUGH

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As indicated in our original petition (Pet. No. 75-1056, p. 15, n.8), we recognize that the issue on which the court below decided in our favor is important and deserves prompt consideration by this Court. In

order, however, to avoid such consideration and the attendant possibility that the Court might review the "good faith defense" question we have presented and reverse the judgment below, the defendants, in their separate cross-petitions, argue that the court of appeals' ruling is "not a final judgment," and that a more complete factual record "will demonstrate that these were, in fact, foreign intelligence surveillances which were not intended to provide evidence for criminal prosecutions" and, for this reason, a later look "will provide a better basis for a review by this Court of the question of the Constitutionality of these surveillances and the application of Title III to this activity" (Pet. No. 75-1046, p. 11; pet. No. 75-1059, p. 10).

This argument illustrates, however, why it would be unsound for this Court now to defer a decision on any of the important issues presented here, either those raised by us or those put forth by the defendants. The consequence of the assertion made in the cross-petitions is to defer an authoritative and binding ruling on the lawfulness and constitutionality of so-called warrantless "intelligence" wiretaps on domestic organizations until after "further development of the record" (Pet. No. 75-1046, p. 11; Pet. No. 75-1059, p. 10). The court of appeals, however, assumed that in light of its unanimous decision in this case, no *future* wiretap of this kind could be defended as lawful (Pet. 80a, n.279):

> Of course, a good faith belief that warrantless national security surveillance of domestic organizations was constitutional could not be asserted in the future, given the decisions in *Keith* and the case *sub judice*; no such belief could be defended as reasonable. . . .

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The defendants have demonstrated by their pleading in this Court that the unanimous holding of the lower court is not viewed by them—and, therefore, possibly not by other government employees—as an authoritative and binding ruling on the question of unlawfulness. If, as they now maintain, an amplification of this factual record may yet render this particular wiretap lawful,[1] then the legality of such conduct will remain undecided for the one to two years that it will take for this case to be heard in the district court and then again to be considered by the court of appeals. There is, consequently, no certainty whatever that the "good-faith defense" might not be asserted in some future proceeding involving a similar wiretap that is in operation today. Such unpredictability on a matter of grave national importance and substantial public attention is, we believe, unjustified.

For the foregoing reasons, the petition for a writ of certiorari in No. 75-1056 should be granted. If our petition is granted while those in Nos. 75-1046 and 75-1059 are denied, it will be a clear indication to those in positions of responsibility that the decision of the court of appeals on the lawfulness of such wiretaps correctly reflects the law. We recognize, however, that the court may deem it appropriate to grant all three petitions and consolidate them for argument. In that event, we submit, the issues presented by the defendants' petitions appear to be those in which the court below focussed its primary attention. Moreover, issues

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[1] It is hard to imagine what evidence to be introduced on remand could more conclusively establish that this was a "foreign intelligence surveillance . . . not intended to provide evidence for criminal prosecution." The court below recognized repeatedly that this was an "intelligence" surveillance (Pet. 37a-47a, 51a-58a), and we did not dispute that characterization.

pertaining to liability logically precede those that relate to any possible affirmative defenses. Accordingly, the defendants (Petitioners in Nos. 75-1046 and 75-1059) should be treated as the principal petitioning parties.

Respectfully submitted,

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